RECENT DECISIONS.

ALEXANDER B. SIEGEL, *Editor-in-Charge.*

BANKRUPTCY—LIFE INSURANCE POLICIES AS ASSETS—EXEMPTIONS.—The bankrupt, having a paid-up policy payable to his children, reserving to himself a stipulated surrender value, payable at specified periods, made a general assignment between two of these periods. *Held*, three judges dissenting, he had no interest that passed to his assignee and under Ky. St., 1903, § 655, the policy was exempt. *Townsend's Assignee* v. *Townsend* (Ky. 1907) 105 S. W. 937.

Where a policy having a cash surrender value, *Van Kirk* v. *Slate Co.* (1905) 140 Fed. 38, or any real value, see 1 COLUMBIA LAW REVIEW 194; *Bank* v. *Willingham's Assignee* (1901) 111 Ky. 64, is not exempt, *In re Slingluff* (1900) 106 Fed. 154, the interest of the bankrupt is property and accordingly passes, *Gould* v. *Ins. Co.* (1904) 132 Fed. 927, subject to the beneficiary's vested rights. *Atkins* v. *Assur. Soc.* (1882) 132 Mass. 395. Thus where the interest is contingent on the insured's living to a certain date, *Brigham* v. *Ins. Co.* (1881) 131 Mass. 319; *Matter of Phelps* (1905) 15 Am. B. R. 170, or surviving the beneficiary, *In re Coleman* (1905) 136 Fed. 818, or where the policy is in endowment form, *Talcott* v. *Field* (1892) 34 Neb. 611, or is payable to the bankrupt's estate and has nearly matured. *In re Mertens* (1904) 131 Fed. 972; *In re Coleman, supra*, unless it is burdensome, *In re Buelow* (1899) 98 Fed. 86, the interest as of the date of bankruptcy, *Meyers* v. *Johnson* (1903) 10 Am. B. R. 687, constitutes property and passes. Accordingly in the principal case the bankrupt's interest was clearly property and although Ky. St., 1903, § 655, is broad in terms the construction of the minority seems the sounder. But see *Pulsifer* v. *Hussey* (1903) 97 Me. 434.

BANKRUPTCY—SUMMARY JURISDICTION—ADVERSE CLAIM.—A judgment creditor, holding a waiver note, had levied, before the petition was filed, on property of the bankrupt marked exempt in his schedule, and had received the proceeds of the execution sale. The bankrupt then amended his schedule by including this property. *Held*, a summary order to the creditor to pay over the proceeds would not issue. *In re Edwards* (1907) 156 Fed. 794. See NOTES, p. 219.

CARRIERS—FEROCIOUS ANIMALS—ABSOLUTE LIABILITY.—The defendant, a common carrier, detained several bears in a freight house on his wharf, using every reasonable precaution. The infant plaintiff, a licensee, while forcing himself through the grating of the cage, was injured by one of the animals. *Held*, Cullen, Ch. J., dissenting, no action would lie. *Molloy* v. *Starin* (N. Y. 1908) 38 N. Y. Law Jour. No. 107.

In the absence of any voluntary act on the part of the plaintiff bringing on his injury, *Farley* v. *Picard* (N. Y. 1894) 78 Hun 560, the keeper of animals "naturally mischievous in their kind" is absolutely liable for injury done by them, *Mason* v. *Keeling* (1700) 12 Mod. 332; *Besozzi* v. *Harris* (1858) 1 Fos. & Fin. 92, irrespective of negligence upon his part, Burdick, Torts 449, resting perhaps upon the theory of nuisance *per se*, Burdick, *supra*, perhaps upon a legal presumption of negligence based upon the very fact of harboring. *Muller* v. *McKesson* (1878) 73 N. Y. 195; cf. *Card* v. *Case* (1848) 5 C. B. 622. Since the common carrier is not bound to transport wild animals, any more than dangerous articles, *California Powder Works* v. *Atlantic etc. Co.* (1896) 113 Cal. 329; *The Nitro-glycerine Case* (1872) 15 Wall. 524, 536; Hutchinson, Carriers, 3rd Ed., § 145, where no evidence indicating that he holds himself out as willing to carry them is present, cf. *Honeyman* v. *Oregon etc. Ry. Co.* (1886) 13 Or. 352; *Hinkley* v.

N. Y. Central etc. Ry. Co. (N. Y. 1874) 3 Thomp. & Cook 281, there is no logical foundation and seemingly no decision exempting him from the extraordinary liability attaching to harborers of such beasts. The majority's view of the law indicates a manifest reluctance to extend this strict liability to common carriers, proceeding from rather vague considerations of public policy. Apart from this, however, the decision may be sustained on the facts, as the plaintiff, though an infant, was concededly *sui juris* and wilfully heedless.

CARRIERS—NON-TRANSFERABLE TICKETS—INDUCING BREACH OF CONTRACT.—The defendant, a ticket scalper, dealt in non-transferable, reduced rate tickets to the injury of the plaintiff. *Held*, actionable as inducing breach of contract. *Bittermann* v. *L. & N. R. R. Co.* (1907) 28 Sup. Ct. 97.

The principal case affirms a similar holding in the federal, *Illinois Cent. Ry.* v. *Caffrey* (1904) 128 Fed. 777; *Nashville Ry. Co.* v. *McConnell* (1897) 82 Fed. 65, and state courts. *Konner* v. *Lake Shore R. R. Co.* (1903) 69 Oh. St. 339; *Schuback* v. *McDonald* (1903) 179 Mo. 163. It is a logical application of the view that inducing breach of contract is actionable, *Angle* v. *Chicago, St. Paul Ry.* (1893) 151 U. S. 1, to the principle that the conditions of non-transferable tickets bind all who acquire them. *Drummond* v. *So. Pac. Co.* (1891) 7 Utah 118; cf. *Mosher* v. *St. Louis R. R. Co.* (1887) 127 U. S. 390. The principal case is an interesting addition to the federal law of inducing breach of contract enlarging the *Angle* case, *supra*, in recognizing legal malice, *Chipley* v. *Atkinson* (1887) 23 Fla. 206, to be a sufficient foundation on which to ground an action, and in sustaining the plaintiff even though the defendant be guilty of no fraud or intimidation. *Raymond* v. *Yarrington* (1903) 96 Tex. 443; *Jones* v. *Stanley* (1877) 76 N. C. 355. Cases contra refuse to regard the inducement as actionable unless accompanied by other tortious conduct, *Raycorft* v. *Tayntor* (1890) 68 Vt. 219, or no fraud or intimidation was used. *Boyson* v. *Norris* (1893) 98 Cal. 578. Missouri is anomalous in affording no remedy for inducing the breach of any contractual relation except that of master and servant, *Glencoe Land Co.* v. *Hudson Bros.* (1897) 138 Mo. 439, in strong contrast with the modern conception that even though no contract subsists malicious instigation is actionable. *West Virginia Trans. Co.* v. *Standard Oil* (1902) 50 W. Va. 611.

CONSTITUTIONAL LAW—DISTRIBUTION OF POWERS—JUDICIAL AND ADMINISTRATIVE FUNCTIONS.—A statute allowed an appeal to the county tax board to the district court. *Held*, the statute was unconstitutional as imposing legislative or administrative duties on the court. *Silver* v. *Board of Com'rs* (Kan. 1907) 92 Pac. 604.

A statute allowed an appeal from county commissioners to a probate court and jury to determine the local assessment due from those benefited by the opening of a drain. *Held*, the statute was constitutional. *Shreves* v. *Gibson* (Kan. 1907) 92 Pac. 584.

A statute conferred on a court the power to review the orders of railroad commissioners. *Held*, it was constitutional. *State* v. *Mo. Pac. R. R.* (Kan. 1907) 92 Pac. 606.

There is a clear judicial question in the *Mo. Pac.* case since the legislature and the railroad commissioners have power only to make reasonable orders. *Reagan* v. *Farmers' Loan & Trust Co.* (1893) 154 U. S. 362. The *Shreves* and *Silver* cases involved the performance of only quasi-judicial duties, since the decision of the court would be subject to reversal by the legislature. *Auditor* v. *Atchison R. R. Co.* (1870) 6 Kan. 500. Such duties involving ministerial or legislative elements are frequently held proper for the courts if they require a considerable amount of judicial discretion. *Strikert* v. *Kelley* (N. Y. 1844) 7 Hill. 9; *Citizens' Savings Bank* v. *Greenburg* (1903) 173 N. Y. 215; 7 COLUMBIA LAW REVIEW 603. So in Kansas a judge may find as to the advisability of enlarging a city. *Callan* v. *City Junction* (1890) 43 Kan. 627; contra, *Galesburg* v. *Hawkins* (1874) 75 Ill. 153; *State* v. *Simmons* (1884) 32 Minn. 540. The degree of judicial discre-

tion involved in *Callan* v. *City Junction, supra,* is no greater than that required to determine the propriety of a tax assessment, and expediency rather than principle seems to distinguish the cases. Certainly as much discretion is required in the *Silver* as in the *Shreves* case, and the latter may be distinguished only on the ground that the duty was not imposed on the judge as such. *Intoxicating Liquor Cases* (1881) 25 Kan. 751. See *U. S.* v. *Ferreira* (U. S. 1851) 13 How. 40.

CONSTITUTIONAL LAW—POLICE POWER—UNPLEASANT SIGHTS.—A stage line displayed on the exterior of its stages large advertisements in brilliant colors. *Held,* since the advertisements could not be considered a public nuisance they could not be abolished under the police power. *Fifth Avenue Coach Co.* v. *City of New York* (1908) 38 N. Y. Law Jour. No. 95.

Sentimental or æsthetic consideration are not recognized as grounds for the exercise of the police power. *People* v. *Green* (1903) 85 N. Y. App. Div. 400; *Bill Posting Co.* v. *Atlantic City* (1904) 71 N. J. L. 72; *Chicago* v. *Gunning System* (1905) 214 Ill. 628. But it has been held that the power of eminent domain may be exercised by Congress to preserve a battleground, *United States* v. *Gettysburg Electric Ry.* (1895) 160 U. S. 668, or by a state to beautify a public square. *Attorney General* v. *Williams* (1899) 174 Mass. 476. It is generally held that a nuisance causes physical discomfort, mere offense to the taste or imagination being insufficient. Wood, Nuisance, 3rd Ed., § 801; *Kirchgraber* v. *Lloyd* (1894) 59 Mo. App. 59; *Woodstock etc. Ass'n* v. *Hager* (1896) 68 Vt. 488. But a case is reported by the secular press to have been decided in California holding that a disfiguring advertisement was as much a nuisance as an offensive odor. See 87 The Outlook 560, November 16th, 1907. If such a position were reached by the courts generally private property could be taken under the police power for æsthetic purposes. Legislatures and courts should be slow to constitute themselves tribunals to regulate public taste. See *Beistein* v. *Donnaldson Lithographing Co.* (1903) 188 U. S. 239. The principal case reiterates a wise and conservative doctrine.

CONTRACTS—ATTORNEY AND CLIENT—LIABILITY OF EXECUTOR.—The brother of the defendant's testator having been indicted, he employed the plaintiff, an attorney, to defend the brother, and agreed to pay his fee. The testator died, and the plaintiff thereafter performed legal services, securing an acquittal. *Held,* the fee could be recovered from the defendants as executors. *Barrett* v. *Towne* (Mass. 1907) 82 N. E. 698.

The employment of a lawyer is both a bilateral contract of service, and the creation of the relation of attorney and client. The status ceases on the death of the client, *Gleason* v. *Dodd* (Mass. 1842) 4 Met. 333, because death revokes the attorney's authority to act as agent, Huffcut, Ag., 2nd Ed., § 71, and it necessarily ceases on the death of the attorney. The contract for legal services and payment therefor, however, although subject to the implied condition of the attorney's continuing to live, Pollock, Con., 4th Ed., 374, 378, runs to the client's personal representatives to the extent of making them liable for fees earned. 2 Pars., Con., 9th Ed., *531; cf. *Kernochan* v. *Murray* (1888) 111 N. Y. 306. The client is the party for whom the attorney acts, Bouvier, Law Dict., 11th Ed., 234, but is not necessarily he who pays the fee. *Arnold* v. *Robertson* (N. Y. 1870) 3 Daly 298. Where, as in the principal case, the fee is not to be paid by the client, it is obvious that the death of either attorney or client will terminate the retainer, but death of the party who is to pay will have no such effect.

CONTRACTS—CERTAINTY—MUTUALITY.—A manufacturer agreed in writing to supply a dealer with as much cement as necessary to push the product, in consideration of the dealer's urging its sale. The dealer did push the product but the manufacturer refused to supply. *Held,* the contract lacked mutuality and was unenforcible; even if taken in connection with a conversation in which the dealer agreed to push and order. *Jackson* v. *Portland Cement Co.* (1907) 106 N. Y. Supp. 1052.

Where the quantity of a product agreed to be supplied or taken is measured by the needs of the buyer, the contract is everywhere good, if these needs lie within clearly defined limits. *Wells* v. *Alexandre* (1891) 130 N. Y. 642. Where the needs of the business are not defined, the buyer is at liberty to use more or less, so long as he observes good faith, and lives up to the legitimate requirements of the business, *Nat'l Furnace Co.* v. *Mfg. Co.* (1884) 110 Ill. 427; *Stover Carriage Co.* v. *Steel Co.* (1900) 105 Fed. 200, since these contracts should not be construed to leave one party subject to the caprice of the other. *Man. Oil Co.* v. *Lubricating Co.* (1902) 113 Fed. 923. Some courts, however, refuse to enforce the contract on the ground of lack of mutuality; *Bailey* v. *Austrian* (1873) 19 Minn. 535; and the same has been held where there is no agreement to buy. Cf. *Chicago etc. Ry. Co.* v. *Dane* (1870) 43 N. Y. 240. In the latter situation the proper theory looks on the transaction as a continuing offer by the seller to ripen into any number of contracts, but revocable as to contracts not yet made. Moreover in the principal case preferring the defendant's goods furnished valid consideration in a unilateral contract; and the oral bilateral contract was valid on the principle stated above. Cf. *Smith* v. *Morse* (1868) 20 La. Ann. 220; *Hickey* v. *O'Brien* (1900) 123 Mich. 611.

COPYRIGHT—PUBLICATION—NOTICE.—The plaintiff's assignor privately exhibited a painting, which bore no notice of copyright. It was, however, copyrighted by the plaintiff, who published photographic copies bearing the proper notice. The defendant infringed the copyright. *Held*, notice of copyright on the published copies only was sufficient. *Am. Tobacco Co.* v. *Werckmeister* (1907) 207 U. S. 284.

§ 4962, U. S. R. S., taken literally, would require notice of copyright to be inscribed on published copies of a book, but only on the original of a map, painting, etc. As the purpose of the notice is to warn the public, *Burrow-Giles Co.* v. *Sarony* (1884) 111 U. S. 53, such literal construction would defeat the legislative design, *Werckmeister* v. *Pierce & Bushnell Mfg. Co.* (C. C., Mass. 1894) 63 Fed. 445, and to prevent this the construction of the principal case had previously been adopted by the lower Federal courts. *Werckmeister* v. *Amer. Lithographic Co.* (C. C., S. D. N. Y., 1905) 142 Fed. 827. To this rule, however, should be added the limitation that if the original of any copyrighted work be in fact published, it, as well as the reproduced copies, should bear notice of copyright, to permit an action for its infringement. Cf. *Pierce & Bushnell Mfg. Co.* v. *Werckmeister* (C. C. A., 1st Circ., 1896) 72 Fed. 54.

CORPORATIONS—DISSOLUTION—REAL PROPERTY.—A manufacturing corporation became dissolved by expiration of the period for which it was chartered. The legislature then passed a statute re-enacting the charter and continuing the corporation for twenty years from the passage of the renewing act. *Held*, that upon dissolution the original grantor took the land by reverter, impressed with a trust, and that by the renewing act his title was divested, and the land re-vested in the corporation. *Diamond State Iron Co.* v. *Husbands* (Del. 1908) 69 Atl. 240. See NOTES, p. 222.

CORPORATIONS—RECEIVER—PROPERTY *in Custodia Legis*.—A bill prayed for an injunction against, and the appointment of a receiver for, a corporation, on the ground of insolvency. An order was issued, restraining the company from selling or paying over any of its assets, and an order to show cause was served. Afterwards, but before the return day, a creditor of the corporation obtained a judgment and levied upon its personal property. Later, a receiver was appointed, who took possession of all the property. *Held*, the judgment creditor was entitled to priority of payment. *Squire* v. *Princeton Lighting Co.* (N. J. 1907) 68 Atl. 176. See NOTES, p. 213.

CORPORATIONS—ULTRA VIRES—IMPLIED POWERS.—An action was brought by a corporation, engaged in running a stage line, to enjoin the city from interfering with advertisements displayed on the exterior of the stages. *Held*,

the act was ultra vires and relief should be denied. *Fifth Ave. Coach Co.* v. *City of New York* (1908) 38 N. Y. Law Jour. No. 95.

The general rule is that any act unauthorized or forbidden is ultra vires, 10 Cyc. 1146, and the more liberal doctrine in respect to private corporations, *Martin* v. *Niagara etc. Mfg. Co.* (1890) 122 N. Y. 165, would not here apply. Neither can it be said that an innocent person will suffer if the ultra vires act is not recognized, and therefore the authorities which give effect to ultra vires contracts when executed are not in point. *Vought* v. *Eastern B. & S. Assn.* (1902) 172 N. Y. 508, 517. But powers not expressly granted to public corporations may be implied in at least four cases: first, when necessary to carry on the business; *Brooklyn Heights Ry. Co.* v. *Brooklyn* (1897) 152 N. Y. 244; second, when conducive to the public's convenience; *Jacksonville R. R.* v. *Hopper* (1895) 160 U. S. 514, 526; third, when authorized by custom, *City of New York* v. *Interborough R. T. Co.* (1907) 53 Misc. 126, and fourth, when reasonably using facilities necessary to the main business. *Brown* v. *Winnisimmet Co.* (Mass. 1865) 11 Allen 326. No justification for advertising is found under the first two cases, and the court while admitting a custom of certain carriers to advertise distinguishes the principal case on the ground that there was no custom to advertise exteriorly. It is submitted that since no new facilities were employed a general power to advertise might be implied as an incident to the business.

CRIMINAL LAW—ESTOPPEL—EMBEZZLEMENT.—The appellant, a deputy assessor, charged with embezzlement, contended that because an irregularity in a tax payment prevented its acceptance by the county, the money misappropriated was held by him for the taxpayer, and not "in the course of his employment as such assessor." *Held*, since he received the money on the assumption of agency for the county, he was estopped to deny the agency. *People* v. *Robertson* (Cal. 1907) 92 Pac. 498.

As the State had not "changed its position," there is no estoppel by misrepresentation. The estoppel assumed is of the sort which in an action to recover money collected for the plaintiff forbids a denial of his right to receive it. Bigelow, Estoppel, 3rd Ed. 576; cf. *Placer County* v. *Astin* (1857) 8 Cal. 304; *Morris* v. *State* (1877) 47 Tex. 583. Its application in criminal law originated in Bishop's criticism of certain English cases on embezzlement, see 2 Bish. New Crim. Law § 365, which construed the statutory phrase, "by virtue of his employment," not to cover acts done against instructions, *Rex* v. *Snowley* (1830) 4 C. & P. 390; *Reg.* v. *Harris* (1854) 6 Cox C. C. 363, or without authority. *Rex* v. *Hawtin* (1836) 7 C. & P. 281. Earliest adopted in California, *Ex parte Hedley* (1866) 31 Cal. 109, and there often affirmed, *People* v. *Treadwell* (1886) 69 Cal. 226; *People* v. *Gallagher* (1893) 100 Cal. 466; *People* v. *Royce* (1895) 106 Cal. 173; it has also been recognized elsewhere, *State* v. *Spaulding* (1880) 24 Kan. 1; *Leonard* v. *State* (1879) 7 Tex. Ct. App. Rep. 417, 466, being used in several instances against the plea that the complainant was a foreign corporation which, not having complied with statutory requirements, was therefore prohibited from having "agents" in the state. *State* v. *O'Brien* (1894) 94 Tenn. 79; *Com.* v. *Shober* (1897) 3 Pa. Sup. Ct. Rep. 554; *State* v. *Pohlmeyer* (1899) 59 Oh. St. 491. A ruling in one such case that the statute embraced a *de facto* agency, *People* v. *Hawkins* (1895) 106 Mich. 479, indicates that Bishop's doctrine is a mere phrase for what is really statutory interpretation. Its use is unnecessary; and there is danger that it may induce a breach of the rule against the enlargement of a penal statute, by judicial construction, to include persons outside its descriptive terms though appearing within its reason and spirit. *U. S.* v. *Wiltberger* (1820) 5 Wheat. 76; *State* v. *Lovell* (1867) 23 Ia. 304; cf. *Moore* v. *State* (1898) 53 Neb. 831.

CRIMINAL LAW—MANSLAUGHTER—NEGLECT OF DUTY.—The deceased, while in a drunken debauch with the defendant, her paramour, took morphine, and in consequence of the defendant's neglect to summon medical aid she died. *Held*, the relation did not raise a duty of care so as to make the defendant criminally responsible. *People* v. *Beardsley* (Mich. 1907) 113 N. W. 1128.

Involuntary manslaughter may arise from an omission to perform a plain duty owing to the deceased, imposed either by law or by contract, where the death is the immediate and direct consequence of the non-feasance. *U. S.* v. *Knowles* (1864) 4 Sawy. 517; *Territ.* v. *Manton* (1888) 8 Mont. 95. Such a duty is imposed by the relation of husband and wife, *Reg.* v. *Plumber* (1844) 1 Car. & K. 600; *State* v. *Smith* (1876) 65 Me. 257; *Territ.* v. *Manton, supra,* or that of parent and child, *Gibson* v. *Com.* (1899) 106 Ky. 360; *Reg.* v. *Cook* (Eng. 1898) 58 Alb. L. J. 232, or where a person has undertaken to care for one that is helpless, *Reg.* v. *Instan* [1893] 1 Q. B. 450; *Reg.* v. *Nichols* (1875) 13 Cox C. C. 75, or where an analogous relation has been assumed by contract, *U. S.* v. *Freeman* (1827) Fed. Cas. 15162; *State* v. *O'Brien* (1867) 32 N. J. L. 169; *Reg.* v. *Lowe* (1850) 3 Car. & K. 123, but not in case where there is only a moral obligation. *U. S.* v. *Knowles, supra; Reg.* v. *Smith* (1869) 11 Cox C. C. 210; *Reg.* v. *Shephard* (1862) 9 Cox C. C. 123. The principal case is sound in refusing to extend the doctrine to those jointly engaged in wrongdoing.

EQUITY—RESCISSION—UNILATERAL ERROR OF LAW.—The plaintiff, though aware of all material facts, was ignorant of the resulting quantum of her interest in an estate. The defendant was acquainted with the plaintiff's error of law, but made no endeavor to rectify it. A suit was brought for rescission of the conveyance to the defendant. *Held,* equity would grant relief. *Faxon* v. *Baldwin* (Ia. 1907) 114 N. W. 40. See NOTES, p. 211.

EQUITY—SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY.—A contract for the purchase and sale of land provided that on default by the vendee the vendor was to retain the part of the purchase money paid, but to bring no action for damages or specific performance. *Held,* the vendee could not have specific performance because there was no mutuality in that the vendor had been barred from the remedy. *Wadick* v. *Mace* (1908) 38 N. Y. Law Jour. No. 105.

This decision is a blind application of the rule of mutuality, which is quite generally stated to be that if the contract, when entered into, is unenforcible in equity by one of the parties, it cannot be there enforced by the other. Fry, Spec. Perf., 4th Ed., §§ 460, 463; *Norris* v. *Fox* (1891) 45 Fed. 406. But in view of the numerous exceptions to the doctrine, see Fry, *supra,* §§ 464-476, and on principle, a better statement is, that equity will not enforce the defendant's promise where to do so would leave him with only an inadequate common law remedy for the non-performance of the plaintiff's agreement. Prof. J. B. Ames, 3 COLUMBIA LAW REVIEW 1; 1 Illinois Law Rev. 548. Although the vendor has a right of specific performance which is in the nature of a barring and foreclosure of the vendee's right to acquire the land, *Lewis* v. *Lechmere* (1721) 10 Mod. 503, 506; see *Clark* v. *Hall* (N. Y. 1839) 7 Paige Ch. 382, so that it might be a defense to a suit by the vendor, that the vendee has stipulated away his equitable remedy; yet as the vendee's right rests on the theory that land is unique and is in no wise dependent on the existence of a corresponding remedy for the vendor, such a stipulation, as here, ought not of itself to impair the vendee's right of specific performance. As the court could have enforced the plaintiff's side of the contract, the objection of want of mutuality should not have prevailed.

EVIDENCE—HEARSAY—INTERPRETER.—A witness had given evidence through an interpreter before the grand jury. In order to discredit a statement made by the witness at the trial, the testimony of a member of the grand jury was offered as to what witness had said through the interpreter. The grand juror did not understand the conversation between the witness and the interpreter. *Held,* the grand juror's testimony was hearsay and inadmissible. *Cervantes* v. *State* (Tex. 1907) 105 S. W. 499.

Where a person has selected his own interpreter he may be regarded as having made the interpreter his agent and the words of the latter are *prima facie* his own. *Commonwealth* v. *Vose* (1892) 157 Mass. 393; 1

Greenl. Evid. §§ 182, 183. Hence the words of the agent may be given in evidence as admissions against the principal where the latter is a party. Wigmore, Evid. §§ 1078 (6), 1810 (2); *Commonwealth* v. *Vose, supra.* But the inference of agency is regarded as by no means a necessary one and it has been stated that the correctness of the interpreter's statements must be shown. *Diener* v. *Diener* (1856) 5 Wis. 483. While it is true that the court should closely scrutinize the question of agency, it seems difficult if not entirely impracticable to go to the length suggested in *Diener* v. *Diener, supra,* without nullifying the rule. It seems that doubt as to the interpreter's truthfulness should affect the weight rather than the admissibility of the evidence. *Commonwealth* v. *Vose, supra,* 395. On the other hand, where an interpreter has been appointed in legal proceedings there is clearly no inference of agency; *Schearer* v. *Harber* (1871) 36 Ind. 536; 1 Greenl. Evid. § 183 (a); the interpreter is a witness merely to the words interpreted. *State* v. *Noyes* (1869) 36 Conn. 80; *Schearer* v. *Harber, supra;* Wigmore, Evid., § 1810 (1). This was his position in the principal case and the evidence of his testimony was equally hearsay whether offered against the witness to be impeached as directly or indirectly self-contradictory. The interpreter should have been called as a witness or his absence adequately explained.

INNKEEPERS—SUMMER RESORT—GUEST AND BOARDERS.—The plaintiff arranged with the proprietors to stop at their hotel situated at a summer resort. A reduced rate per week, but no definite time, was fixed. *Held,* the relation of innkeeper and guest was created, so that the proprietors were liable as insurers for the loss of valuables in the plaintiff's room. *Holstein* v. *Phillips & Sims* (N. C. 1907) 59 S. E. 1037.

Where the keeper of a public house professes to supply for hire the needs of travelers, persons who receive from him the entertainment for which they have occasion are *prima facie* guests, *Pinkerton* v. *Woodward* (1867) 33 Cal. 557, and this presumption continues until the contrary clearly appears. *Ross* v. *Mellin* (1887) 36 Minn. 421; *Jolie* v. *Cardinal* (1874) 35 Wis. 118. The fact that one has arranged to stay for a week or more, or has received a weekly instead of a daily rate does not overcome it, *Beale* v. *Posey* (1882) 72 Ala. 223; *Pinkerton* v. *Woodward, supra; Pope* v. *Mulenbacker* (1904) 136 Mich. 611, but a contract for both a definite and a protracted stay, in return for which a special rate is given, is the strongest evidence that one is a boarder and not a guest. *Moore* v. *Long Beach Development Co.* (1891) 87 Cal. 483; *Schoecraft* v. *Bailey* (1868) 25 Ia. 553; *Crapo* v. *Rockwell* (1905) 94 N. Y. Supp. 1122. Even where the rate is fixed in expectation of a person's protracted stay, if his profession calls for such unexpected and frequent change of location that he must live with those who provide for travelers, he is necessarily a guest. *Hancock* v. *Rand* (1883) 94 N. Y. 1. Where a hotel keeper at a summer resort holds himself out to the general public, his house does not lose the nature of an inn because the guests are likely to stay longer on account of exceptional attractions; and nothing appeared in the principal case to rebut the presumption that the relation of innkeeper and guest existed.

INSURANCE—REPUDIATION BY INSURER—DAMAGES.—The defendant wrongfully refused to accept a premium, and claimed a forfeiture of the policy. The plaintiff sued for damages. *Held,* the life continuing insurable, the measure of damages was the difference in cost of the old insurance and a new policy, adding profits, but allowing the insurer compensation for the risk already run. *Krebs* v. *Security Trust & Life Ins. Co.* (1907) 156 Fed. 294.

There is a tendency not to apply the illogical doctrine of anticipatory breach to insurance contracts; 6 COLUMBIA LAW REVIEW 589; yet many courts give an action on refusal of the insurer to continue the policy, for damages upon rescission, cf. *Day* v. *Conn. Ins. Co.* (1878) 45 Conn. 480, or upon an anticipatory breach, *Am. Ins. Co.* v. *McAdam* (1885) 109 Pa. St. 399, or where the equitable remedy of reinstatement, *Meyer* v. *Knicker-*

bocker Trust Co. (1878) 73 N. Y. 516, would work hardship. *N. Y. Life Ins. Co.* v. *Statham* (1876) 93 U. S. 24 (intervention of civil war). There is a conflict regarding the measure of damages. Some courts adopt the rule of the principal case, *Universal Ins. Co.* v. *Binford* (1887) 76 Va. 103; *Ebert* v. *Mutual R. F. L. Assn.* (1900) 81 Minn. 116, 128, and if the life is no longer insurable give the equitable value of the policy as of the time of its dissolution. *Smith* v. *Ins. Co.* (1876) 64 Mo. 330; *Speer* v. *Phoenix Ins. Co.* (N. Y. 1885) 36 Hun 322. Other courts hold that the insured may recover the premiums paid with interest from the time of each payment, *Ala. Ins. Co.* v. *Garmany* (1884) 74 Ga. 51, or according to the exigencies of each case, *Am. Ins. Co.* v. *McAdam, supra,* allowing the insurer no compensation for the risk it has run. *Van Werden* v. *Assurance Co.* (1896) 99 Ia. 621. The measure adopted in the principal case is substantially the equitable value, which, since the action is based upon a rescission in the sense of cancellation, rather than upon an anticipatory breach, is the correct one.

MASTER AND SERVANT—LIABILITY FOR SERVANT'S WILFUL TORT.—The defendant's engineer, while operating his private tramway, wilfully blew the whistle to frighten the plaintiff's mule which resulted in the plaintiff's injury. *Held,* Connor and Walker, JJ., dissenting, the defendant was liable. *Stewart* v. *Cary Lumber Co.* (N. C. 1907) 59 S. E. 545.

Ordinarily the master is liable only for those torts of his servant committed within the scope of the employment and for the master's benefit. *McClung* v. *Dearborne* (1890) 134 Pa. St. 396; *Mott* v. *Consumer's Ice Co.* (1878) 73 N. Y. 543; *Skipper* v. *Clifton Mfg. Co.* (1900) 58 S. C. 143. But where an engineer on an authorized run, *Cousins* v. *Hannibal etc. Ry.* (1898) 92 Tex. 288, wilfully mishandles the locomotive, *New Orleans etc. Ry.* v. *Allbritton* (1859) 38 Minn. 242, 277, lets off steam, *Toledo etc. Ry. Co.* v. *Harmon* (1868) 47 Ill. 298, blows the whistle, *Chicago etc. Ry.* v. *Dickson* (1872) 63 Ill. 151, even where required by statute; *Bittle* v. *Camden etc. R. R. Co.* (1893) 55 N. J. L. 615; the exigencies of the public safety, *Nashville etc. Ry.* v. *Starnes* (Tenn. 1871) 9 Heisk. 52, or the ownership of the dangerous instrumentality, *Pa. & Reading Ry.* v. *Derby* (U. S. 1852) 14 How. 468, are held to necessitate a stricter rule of responsibility. See cases *supra;* contra, *Stevenson* v. *Southern Pacific* (1892) 93 Cal. 558; *Cooke* v. *Illinois Central* (1879) 30 Ia. 202. While this is an innovation on the older doctrine, cf. *M'Manus* v. *Crickett* (Eng. 1801) 1 East. 106, it would seem to be in accord with the modern tendency to extend the master's responsibility to acts naturally flowing from the employment though not within its scope. Cf. *Ruddiman & Co.* v. *Smith* (1889) 60 L. T. Rep. N. S. 708.

MUNICIPAL CORPORATIONS—CONTRACT FOR PATENTED PAVEMENTS.—The defendant advertised for bids for a pavement to be laid by the plaintiff's patent method or by two other unpatented methods producing a similar pavement. *Held,* this afforded the opportunity for competition required by law. *Warren Bros. Co.* v. *New York* (N. Y. 1907) 83 N. E. 59.

Where a city must award contracts for public improvements to the lowest bidder, and yet it contracts for a patented article some jurisdictions hold the contract void because no fair competition can be had, *Burgess* v. *City of Jefferson* (1869) 21 La. Ann. 143; *Dean* v. *Charlton* (1869) 23 Wis. 590, or on the ground that property owners are deprived of their statutory rights. *Nicholson Pavement Co.* v. *Painter* (1868) 35 Cal. 699; cf. *Kansas City Trans. Co.* v. *Huling* (1886) 22 Mo. App. 654. Entering into such a contract, or the levy of a tax under it, may be enjoined. *Dolan* v. *New York* (N. Y. 1868) 4 Abb. Pr. N. S. 397. Other jurisdictions hold such a contract valid, on the theory that the bidder may obtain the patentee's license, *Hobart* v. *Detroit* (1868) 17 Mich. 246, or that the improvement is within the general power of the city and the statute does not apply. *Matter of Dugro* (1872) 50 N. Y. 13; *Barber Asphalt Paving Co.* v. *Hunt* (1889) 100 Mo. 23. Under either rule, if any bidder is licensed to use a patent, *Hastings* v. *Columbus* (1885) 42 Oh. St. 585; *Kilvington* v. *Superior* (1892) 83 Wis. 222, or

various methods, patented or otherwise are specified, the contract is valid as there is proper competition. *Barber Asphalt Paving Co.* v. *Gogreve* (1889) 41 La. Ann. 251, 261. The principal case is within this consideration.

MUNICIPAL CORPORATIONS—TORT LIABILITY—MANAGEMENT OF BUILDINGS.—The plaintiff was injured by the negligent operation of an elevator in a police station. *Held,* Haight, J., dissenting, the maintenance of a police station was a governmental function for the negligent discharge of which the defendant city was not liable. *Wilcox* v. *The City of Rochester* (1907) 38 N. Y. Law Jour. No. 70.

The principal case exemplifies the well-settled rule that a municipal corporation while liable for torts committed in the exercise of a private function is not amenable for those occurring in the performance of a public duty. Burdick, Torts, 106. As to what is a corporate function courts differ. Concededly the preservation of the peace is a purely public function, *Gray* v. *Mayor of Griffin* (1900) 111 Ga. 261, and it is held that when the city maintains a jail, *Hite* v. *Whitley County Court* (1891) 91 Ky. 168; *Brown* v. *Town of Guyandotte* (1890) 34 W. Va. 299, or a police station, *Kelley* v. *Cooke* (1898) 21 R. I. 29, it is performing such a function. No distinction is drawn between torts committed by an officer, *Gallikson* v. *McDonald* (1895) 62 Minn. 278, and negligence in maintaining property, *Snyder* v. *City of St. Paul* (1892) 51 Minn. 466, except when the building is used for private purposes. *Worden* v. *New Bedford* (1881) 131 Mass. 223. It is contended by some that the ownership of property entails the obligation of care from which even a city is not exempt, *Briegel* v. *Phila.* (1896) 135 Pa. 451, irrespective of whether the use be public or private. Jones, Neglig. Municip. Corp., 305 et seq.; Goodnow, Municipal Home Rule, 150 et seq. Of the cases cited in support of this contention the majority are distinguishable because either the question was not raised, *Galvin* v. *Mayor* (1889) 112 N. Y. 223, or the liability is based on another ground, *Carrington* v. *St. Louis* (1886) 89 Mo. 208 (duty to keep sidewalks clear), or controlling cases are misconstrued, *Chicago* v. *Dermody* (1871) 61 Ill. 431, or the question was assumed, *McCaughrey* v. *Tripp* (1879) 12 R. I. 449, or are apparently overruled, *Sullivan* v. *Holyoke* (1883) 135 Mass. 73; cf. *Kelley* v. *Boston* (1904) 186 Mass. 165, or proceed upon erroneous considerations. *Edwards* v. *Pocahontas* (1891) 47 Fed. 268. Assuming the theoretical validity of this view, which appears to be open to doubt, it seems that the application of this doctrine would create more confusion than its adoption would justify.

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER—KNOWLEDGE OF COLLATERAL AGREEMENTS—CONSIDERATION.—A bank, knowing that a note was given in consideration of an executory agreement, discounted it and gave the indorser credit on its books for the amount. *Held,* knowledge of the collateral agreement was not fatal unless there was also knowledge of the breach of the agreement; but merely crediting the depositor did not constitute the bank a *bona fide* holder for value. *McKnight* v. *Parsons* (Ia. 1907) 113 N. W. 858.

The current of authority is in accord with the principal case on both propositions. Notice of the failure of consideration must be brought home to the holder before he becomes a purchaser to defeat recovery; *Bank* v. *Cason* (1887) 39 La. Ann. 865; *Davis* v. *McCready* (1858) 17 N. Y. 230; *Borden* v. *Clark* (1873) 26 Mich. 410; or if only part has been paid when notice is given the holder is protected *pro tanto*. *Dresser* v. *Missouri Const. Co.* (1876) 93 U. S. 92. But when a bank only credits the amount of the note it has not parted with value or changed its position, *Bank* v. *Green* (1906) 130 Ia. 384; *Bank* v. *Blue* (1896) 110 Mich. 31; *Bank* v. *Valentine* (N. Y. 1879) 18 Hun 417, and is not a purchaser for value until the credit thus given is exhausted. *Bank* v. *Blue, supra.* This seems sound as it can at any time on receiving notice cancel the credits and tender back the note. *Thompson* v. *Sioux Falls Bank* (1893) 150 U. S. 231, 244; *Bank* v. *Huver* (1886) 114 Penn. 216.

NEGOTIABLE INSTRUMENTS—JOINT STOCK ASSOCIATION BONDS—EXEMPTION OF SHAREHOLDERS LIABILITY.—The plaintiff sought to recover coupons of a stolen bond issued by the Adams Express Co., from the defendant, an innocent purchaser for value. The bond contained the stipulation that no shareholder should be liable thereon as partner or otherwise. *Held*, the bond was negotiable, and the plaintiff should recover. *Hibbs* v. *Brown* (N. Y. 1907) 82 N. E. 1108. See NOTES, p. 215.

PARTNERSHIP—EQUITABLE CONVERSION OF FIRM REALTY—RIGHTS OF THE HEIR OF A DECEASED PARTNER.—A., B., and C. were partners in a canning business. On A.'s death B. and C. bought in the plant at a sale ordered by a court of equity on their *ex parte* petition alleging that the state of the partnership affairs made a sale necessary. After the sale, but before its confirmation, A.'s administrator intervened and acquiesced in the irregularity of such a purchase by the surviving partner. Later A.'s heirs set up that as a portion of the property was realty, they should have been served. *Held*, the heirs were not parties in interest. *French* v. *Vanatta* (Ark. 1907) 104 S. W. 141. See NOTES, p. 208.

PERSONAL PROPERTY—ESTOPPEL—OSTENSIBLE OWNERSHIP.—Chattels sold to the defendant were left in the possession of the vendor, who transferred them to the plaintiff for value. The defendant took possession, and replevin was brought. *Held*, he was not estopped to deny his title. *Huell-Mantel* v. *Tweddle* (Mich. 1907) 114 N. W. 212.

The bare possession of personal chattels without some other evidence of property, or of authority from the owner to sell, does not enable the possessor to transfer a better title than he himself has. *Diebolt* v. *Canal Boat* (1880) 4 Fed. 571; *Nichols* v. *Monjeau* (1903) 132 Mich. 582; *Johnson* v. *Frisbie* (1868) 29 Md. 76. To raise an estoppel there must have been an overt act, upon which the third party relied, *Van Horne* v. *Overman* (1888) 75 Ia. 421, committed by the owner either with the view to inducing the third party to alter his position or knowing as a reasonable man that this would occur. *Knights* v. *Wiffen* (1870) L. R. 5, Q. B. 660; *McNeil* v. *10th Nat'l Bank* (1871) 46 N. Y. 325. Thus in the case of a silent acquiescence misleading a party to his disadvantage, there must have been occasion and duty to speak, *Thompson* v. *Simpson* (1891) 128 N. Y. 270, with knowledge that the third party would probably rely on silence to his injury. 5 COLUMBIA LAW REVIEW 473. In some jurisdictions the reasonableness of the act and the element of knowledge are disregarded, and an authorized retention of possession by the vendor estops the owner from ascertaining title against a subsequent *bona fide* purchaser. *Webster* v. *Peek* (1863) 31 Conn. 495; *Stephens* v. *Gifford* (1890) 137 Pa. 219; *Davis* v. *Bigler* (1869) 62 Pa. 247. The plaintiff in the principal case had no reason to suppose that his vendor was attempting to resell the goods, nor knowledge that his silence was likely to mislead the defendant. The decision seems clearly in accord with the weight of authority.

PLEADING AND PRACTICE—INHERENT POWER OF PHYSICAL EXAMINATION.—In a suit for permanent personal injury, the defendant requested a physical examination of the plaintiff by competent physicians to be appointed by the court. *Held*, the trial judge had a discretionary power on a proper showing to order an examination. *City of Cedartown* v. *Brooks* (Ga. 1907) 59 S. E. 836.

At common law there is no mention of the power, *U. P. Ry. Co.* v. *Botsford* (1890) 141 U. S. 250, but starting with *Walsh* v. *Sayre* (N. Y. 1868) 52 How. Pr. 334, courts began to hold it inherent, until to-day this is the holding of the majority. 2 Sutherland, Damages, 3rd Ed., 451. The power is held discretionary, *Schroeder* v. *R. R. Co.* (1877) 47 Ia. 375; *R. R. Co.* v. *Childress* (1899) 82 Ga. 719, and the examination must be reasonable and proper, *Shephard* v. *Ry. Co.* (1885) 85 Mo. 629; *Turnpike Co.* v. *Baily* (1881) 37 Ohio St. 104, necessary, *Sibley* v. *Smith* (1885) 46 Ark. 275,

under the control of the court, *Belt Co.* v. *Allen* (1898) 102 Ky. 551, and by competent experts. *Ala. R. R. Co.* v. *Hill* (1890) 93 Ala. 514. An examination will not be ordered if anæsthetics must be used, *Studgeon* v. *Sand Beach* (1895) 107 Mich. 496, or if there is any danger to life or health, *Belt Co.* v. *Allen, supra,* or if any serious pain will result; *R. R. Co.* v. *Allen* (1889) 90 Ala. 71; but if the plaintiff refuses, in a proper case, to submit to the examination, he will be non-suited. *Wanek* v. *Winona* (1899) 78 Minn. 98. Various theories are advanced to show that the power is inherent and that policy favors its exercise is shown by the current of legislation; cf. N. Y. Code Civ. Pro. §§ 872, 873; but on principle it would seem that it does not exist in the absence of statutory authority. *McQuigan* v. *R. R. Co.* (1891) 129 N. Y. 51; *U. P. Ry. Co.* v. *Botsford, supra; Stack* v. *R. R. Co.* (1900) 177 Mass. 155.

PUBLIC SERVICE COMPANIES—VALUATION OF PROPERTY.—A municipality entered into a contract to purchase a street railway when it should be constructed. *Held,* the price paid should be the value as a structure, including its value as a going concern, but excluding the franchise. *Mayor etc. of Dudley* v. *Dudley etc. Ry. Co.* (1907) 97 L. T. Rep. N. S. 556. See NOTES, p. 217.

REAL PROPERTY—VENDOR'S LIEN—AGREEMENTS TO SUPPORT.—A mother conveyed land to her daughter reserving the right to support upon the land to the daughter's family. The daughter died and the mother inherited a life estate in the charged estate. *Held,* the mother's grantee acquired a lien chargeable against the remainderman for the reasonable value of the maintenance. *Tucker* v. *Tucker* (1907) 106 N. Y. Supp. 713.

An agreement to support the vendor of realty to be specifically enforcible against the land, must be expressly reserved in the deed, *Pownall* v. *Taylor* (Va. 1839) 10 Leigh 172; *Wilson* v. *Wilson* (1854) 38 Me. 18; *Gallagher* v. *Herbert* (1886) 117 Ill. 160, for owing, largely, to the law's antipathy to secret liens. *McCandlish* v. *Keen* (Va. 1857) 13 Gratt. 615; *Heist* v. *Baker* (1865) 49 Pa. St. 9, an implied lien for the unpaid purchase price does not arise when the collateral covenants of the vendee are the considerations for the conveyance, *Arlin* v. *Brown* (1862) 44 N. H. 102; *Meigs* v. *Dimock* (1827) 6 Conn. 458, nor when the consideration is such that the amount of the lien cannot be accurately stated. *Peters* v. *Tunell* (1890) 43 Minn. 473; *Hiscock* v. *Norton* (1879) 42 Mich. 320. When the lien is reserved it is equivalent to an equitable mortgage, *Kirk* v. *Williams* (1883) 24 Fed. 437; *Gordon* v. *Rixey* (1882) 76 Va. 694, charging the entire fee irrespective of later partition, cf. *Commons* v. *Commons* (1888) 115 Ind. 162, 168, and giving constructive notice to all in the chain of title. *Deacon* v. *Taylor* (1876) 53 Miss. 697. Texas, contra, holds that a reserved vendor's lien vests superior title in the vendor. *Webster* v. *Munn* (1889) 52 Tex. 416. Since, if the lien is reserved the rights of the parties depend on their contract, the performance of any covenant may be charged against the land. *Harvey* v. *Kelley* (1867) 41 Miss. 490; *Warford* v. *Hawkins* (1897) 150 Ind. 489; *Chase* v. *Peck* (1860) 21 N. Y. 581. While there is confusion as to the assignability of an implied vendor's lien, Pomeroy, Eq. Jur. § 1254, it is settled that a reserved lien is enforcible by an assignee. *Ober* v. *Gallagher* (1876) 93 U. S. 199. In the principal case, after the death of the daughter the contract was no longer specifically enforcible, *Campbell* v. *Potter* (1893) 147 Ill. 576, and the mother became entitled to the reasonable cost of her support, *Ralphsnyder* v. *Ralphsnyders* (1890) 17 W. Va. 28, which was chargeable against the entire fee, irrespective of the inheritance of the mother, cf. *Commons* v. *Commons, supra,* and her assignee was correctly given the value of her maintenance.

RECEIVERS—BOND—CONCLUSIVENESS AGAINST SURETIES OF JUDGMENT AGAINST RECEIVER.—An action was brought on a receiver's bond, conditioned that he should faithfully discharge his duties as receiver. A judgment had been recovered against the receiver, but no accounting had been taken nor had

the sureties received any notice. *Held*, the sureties were not concluded by the judgment. *Coe* v. *Patterson* (1907) 106 N. Y. Supp. 659.

Where an accounting has been taken and the sureties have had an opportunity to intervene, they are concluded by the prior adjudication. *Commonwealth* v. *Gould* (1875) 118 Mass. 300; *Ball* v. *Chancellor* (1885) 47 N. J. L. 125. An accounting is necessary to establish the receiver's inability to pay, and hence the sureties' liability; *French* v. *Dauchy* (1892) 134 N. Y. 543; and notice to the sureties is needed to render the judgment admissible in the action on the bond, there being no privity between the receiver and the sureties. *Douglas* v. *Howland* (1840) 24 Wend. 35. The principal case is clearly sound; and it seems that the decisions in apparent conflict properly rest upon the peculiar nature of the bond in suit—as in the actions on administrator's bonds, *Deobold* v. *Opperman* (1888) 111 N. Y. 531, which are conditioned upon the performance of orders of the surrogate—or the precise wording of the particular obligation, whereby extraordinary liability is assumed. *Douglas* v. *Ferris* (1893) 138 N. Y. 192.

STATUTES—NEW YORK USURY LAW—STATE BANK NOT A BONA FIDE HOLDER.—The defendant made a promissory note for a usurious consideration which a state bank discounted with notice of the usury, and upon which the bank's receiver brought suit. *Held*, as the bank took with notice of the usury it could not recover. *Schlesinger* v. *Lehmaier* (Ct. of App., 1908) 38 N. Y. Law Jour. No. 106.

In *Schlesinger* v. *Gilhooly* (1907) 189 N. Y. 1, it was decided that a state bank taking without notice a note void at its inception for usury, may recover thereon, three judges holding this to be a necessary implication from the silence of Congress on this point, basing this implication on the sole ground that that body has the power to legislate for national banks, and has in fact declared usurious contracts, to which such a bank is a party, to be valid, U. S. R. S. §§ 5197, 5198, which legislation has been followed by the state to put state banks on an equality with national banks. N. Y. Banking Law § 55. Three judges held the above construction of the statutes unwarranted, and that such interpretation would make them to that extent unconstitutional. The remaining judge agreed in allowing recovery, reaching this result, however, purely upon his interpretation of the Negotiable Instruments Law. This decision is recognized in the principal case as settled law, although it creates the possibility in New York of the validating of a previously void instrument by its transfer to a bank. See 6 COLUMBIA LAW REVIEW 519. The principal case holds, however, that the previous decision goes far enough in "safeguarding" the banks, and that good faith under such circumstances is necessary to recovery. When the sole express intention of the federal statute was to validate usurious contracts made by national banks, an intention generally to "safeguard" should not be implied from the silence on the point of indorsement. To confine the statute to its expression would avoid judicial speculation as to the necessary extent of the "safeguarding" when in conflict with state policy.

STATUTES—MECHANIC'S LIEN—RIGHTS OF SUBCONTRACTOR.—An owner paid subcontractors who were entitled to, but did not, file liens. An action was brought by another subcontractor to enforce his lien. *Held*, the owner was entitled to the same credit as if the liens of the paid subcontractors had been filed. *Fossett* v. *R. I. Lumber & Mfg. Co.* (Kan. 1907) 92 Pac. 833.

The Kansas statute, giving a lien directly on the property, is based upon the principle underlying the so-called Pennsylvania system of protecting mechanics and materialmen; *Hunter* v. *Truckee Lodge* (1879) 14 Nev. 24, 41; but it borrows from the so-called New York system the rule that the aggregate of liens is limited in amount to the principal contract price. *Hotel Co.* v. *Hardware Co.* (1896) 56 Kan. 448; *Gibson* v. *Lenane* (1883) 94 N. Y. 183; *Mantonya* v. *Reilly* (1900) 184 Ill. 183. Thus, while not going to the extent of the New York system in limiting further the fund available for subcontractors' claims to that part of the contract price unpaid

to the contractor when the claims are filed, *Van Clief* v. *Van Vechten* (1892) 130 N. Y. 571; *Gibson* v. *Wheeler* (1895) 110 Cal. 243; the contract price *in toto* is established as such a fund. *Clough* v. *McDonald* (1877) 18 Kan. 114. If the cost exceeds the contract price, the subcontractors take their *pro rata* share and the owner is entitled to a credit of that amount where he has paid in full the claim of a subcontractor who has filed a lien. *Chicago Lumber Co.* v. *Allen* (1894) 52 Kan. 795; *Smalley* v. *Gearing* (1899) 121 Mich. 190. But the filing of the lien is merely a remedy for the enforcement of a right already vested in the lienor, *Nixon* v. *Cydon Lodge* (1896) 56 Kan. 298; *Central Trust Co.* v. *Richmond etc. R. Co.* (1895) 68 Fed. 90, and the argument that when this claim has been satisfied without resort to the remedy, no credit should be given the owner, on the supposition that the remedy might not have been invoked and the claim thereby lost, seems "palpably unjust" and to rest on truly "technical grounds." And see *Dunlop* v. *Kennedy* (Cal. 1893) 34 Pac. 92; *Central Trust Co.* v. *Richmond etc. R. Co., supra.*

SURETYSHIP—STATUTE OF FRAUDS—ORIGINAL OBLIGATION.—A sub-contractor threatened to stop work, pursuant to a condition in the contract, because the contractor had failed to make a stipulated payment; whereupon the owner promised to pay him upon completion of the work. *Held,* this was not a special promise to answer for the debt or default of another. *Sinkovitz* v. *Applebaum* (1907) 107 N. Y. Supp. 122.

Forbearance to sue, though good consideration, *Thomas* v. *Delphy* (1870) 33 Md. 373, is insufficient to take an agreement to pay another's existing debt out of the statute. *Riegelman* v. *Focht* (1891) 141 Pa. St. 380; *Gillfillan* v. *Snow* (1875) 51 Ind. 305; contra, *Stewart* v. *Hinkle* (1851) Fed. Cas. 13,430 (where this distinction was overlooked). But where the promisor has an interest in property affected, *Mitchell* v. *Griffin* (1877) 58 Ind. 559, or in the agreement, *Davis* v. *Patrick* (1891) 141 U. S. 479, or its object is to benefit him, *Emerson* v. *Slater* (U. S. 1859) 22 How. 28, 43; *Bailey* v. *Marshall* (1895) 174 Pa. St. 602, or if he has derived an actual benefit; *White* v. *Rintoul* (1888) 108 N. Y. 222; his promise, though incidentally to pay another's debt, is not within the statute. *Nelson* v. *Boynton* (Mass. 1841) 3 Met. 396, 400; *Clark* v. *Jones* (1887) 85 Ala. 127. Opposed to this authority are cases like *Stewart* v. *Hinkle, supra,* which effectually nullifies the statute; and *Dillaby* v. *Wilcox* (1891) 60 Conn. 468, which requires the release of the original debtor. On authority the principal case seems sound; but it must be distinguished from a promise to indemnify, in reliance upon which a debt has been contracted. *Leonard* v. *Bredenburgh* (N. Y. 1811) 8 John. 29; 2 COLUMBIA LAW REVIEW 104.

TRADE-MARKS AND NAMES—UNFAIR COMPETITION—MISREPRESENTATION BY PLAINTIFF.—The plaintiff had by purchase merged with his own newspaper another called "St. Louis Grocer and General Merchant" which he ceased to publish but which he nevertheless listed with advertising agencies. The defendant then called his newspaper "Eli Grocer and General Manager." *Held,* no trade-mark could be claimed by the plaintiff, as the name was dissociated from any vendible commodity, and equity would not relieve from unfair competition because of misrepresentation of the paper as a going concern. *Grocers' Journal Co.* v. *Midland Pub. Co.* (Mo. 1907) 106 S. W. 310.

The name of a periodical or newspaper can be a trade-mark, *Gannett* v. *Rupert* (1904) 127 Fed. 962; Browne, Trade-Marks, 2nd Ed., § 115, though the name in the principal case may be open to the objection with regard to geographical, generic or descriptive words. 6 COLUMBIA LAW REVIEW 349. Assuming otherwise there seems insufficient evidence of abandonment. Hopkins, Unfair Trade, § 60. It is doubtless the rule that no trade-mark can exist as such apart from a vendible commodity, *McAndrews* v. *Bassett* (1864) 4 De Gex, J. & S. 380; *MacMahan Co.* v. *Denver Co.* (1901) 113 Fed. 468; Browne, Trade-Marks, *supra,* §§ 129-130. 301-302, but it did not appear that back numbers of the periodical were not purchasable, and plain-

tiff's intention not to abandon was clear in spite of lapse of time. See Browne, Trade-Marks, *supra*, § 681. The court, however, bases its decision chiefly on the doctrine of unfair trade, regardless of the existence of a technical trade-mark or of the fact of abandonment. Equity will not grant relief where the plaintiff has himself deceived the public by false representations. 8 COLUMBIA LAW REVIEW 40; *Manhattan Co.* v. *Wood* (1883) 108 U. S. 218; *Worden* v. *Cal. Fig Syrup Co.* (1903) 187 U. S. 516. It is difficult to perceive how actual injury could have resulted to the public from plaintiff's representations, but that consideration does not affect equity's refusal to act, 8 COLUMBIA LAW REVIEW 40, so long as the misrepresentations are not mere exaggeration or "puffing."

TRUSTS—BREACH OF ORAL AGREEMENT—CONSTRUCTIVE TRUSTEE.—A son accepted a conveyance of land, agreeing orally that after his father's, the grantor's death, he would deed it to his sisters. After his father's death, he refused, and pleaded the Statute of Frauds. *Held*, equity would raise a constructive trust for the beneficiaries. *Hilt* v. *Simpson* (Ill. 1907) 82 N. E. 588.

The violation of a parol promise to hold in trust is a mere breach of contract and not a fraud against which equity will relieve. *Patton* v. *Beecher* (1878) 62 Ala. 579. In some jurisdictions the consideration, i. e., the land, will be restored, *Ryan* v. *Dox* (1866) 34 N. Y. 307, but the beneficiary is helpless. The principal case refers to *Stahl* v. *Stahl* (1905) 214 Ill. 131 for its *ratio decidendi*. There, the "fiduciary or confidential relation" of the parties was emphasized; but the facts fail to disclose such relation. There were no active measures taken to secure the position; there was nothing except assent to act and confidence reposed. Every grantor has that confidence in the prospective trustee. The court might, since the grantor was on her deathbed, have applied the rule which obtains in cases of devise, *Norris* v. *Frazer* (1869) L. R. 15 Eq. Cas. 318, where the beneficiary is allowed to enforce the oral trust. See *Ahrens* v. *Jones* (1902) 169 N. Y. 555. *Stahl* v. *Stahl*, *supra*, is directly opposed to *Lantry* v. *Lantry* (1869) 51 Ill. 458, to which the court did not refer. See 6 COLUMBIA LAW REVIEW 326.

WATERS AND WATERCOURSES—PERCOLATING WATERS—RIGHT TO PUMP.—The plaintiff owned a mineral spring the flow from which was directly affected by the defendant's use of a steam rotary pump to obtain water on his land. Both parties were selling the water. *Held*, an injunction would issue. *Hathorn* v. *Dr. Strong's Saratoga Springs Sanitarium* (1907) 106 N. Y. Supp. 553.

The rule established by *Chasemore* v. *Richards* (1859) 7 H. L. Cas. 349, that an owner has an absolute right to take percolating waters, cf. *Ballard* v. *Tomlinson* (1885) 25 Ch. D. 115, has been overthrown in New York by *Forbell* v. *City of Brooklyn* (1900) 164 N. Y. 522, which limits the owner to the use of the water for the beneficial enjoyment of the land. There is no liability, however, to one making the same use of the water. *Merrick Water Co.* v. *City of Brooklyn* (1898) 32 App. Div. 454. Liability in the principal case must depend solely, therefore, on the ground that the percolation was induced by pumping. It is true that *Acton* v. *Blundell* (1843) 12 M. & W. 324, can be considered to apply only to water percolating naturally through the land; and the reason there stated for the extraordinary rule as to percolating waters, viz., the difficulty of determining the effect of a proposed diversion, does not exist here to the same extent. On the other hand, where the doctrine of reasonable user prevails, it would seem better policy to allow the obtaining of the water in the most economic way, in order not to restrict its application to justifiable uses. Cf. *Clarke County* v. *Lumber Co.* (1902) 80 Miss. 535.